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In the Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

BERNARD BUNCH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After a police officer has lawfully stopped an automobile for a traffic violation, arrested the driver, decided to impound the vehicle, and ordered a passenger to exit the car, may the officer question the passenger and request identification in the absence of reasonable suspicion that the passenger is engaged in criminal activity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Illinois, respectfully asks this Court to issue a writ of certiorari to the Supreme Court of Illinois to review that court's judgment and order entered on August 21, 2003.

OPINIONS BELOW

The Illinois Appellate Court issued its decision, reversing the denial of respondent's motion to suppress evidence, on February 13, 2002. *People v. Bunch*, 764 N.E.2d 1189 (Ill. App. 2002). A copy of this decision is attached hereto as Appendix B. The Supreme Court of Illinois issued its decision in this case, affirming the decision of the appellate court, on August 21, 2003. *People v. Bunch*, 796 N.E.2d 1024 (Ill. 2003). A copy of this decision is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

The Appellate Court of Illinois, First District entered its judgment on January 21, 2003, and the Illinois Supreme Court affirmed that judgment on August 21, 2003. The decision of the Illinois Supreme Court was explicitly based on the Fourth Amendment to the United States Constitution. Accordingly, Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. XIV

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was charged by information with one count of possession of a controlled substance. Respondent filed a pre-trial motion to suppress, which was denied. Respondent's motion to suppress was heard simultaneously with his trial. At the conclusion of respondent's bench trial, the circuit court found respondent guilty and sentenced him to four years in the Illinois Department of Corrections.

The People presented the testimony of Officer Daniel Lukensmeyer, the only witness to testify at the hearing on the motion to quash arrest and suppress evidence. Officer Lukensmeyer testified that on February 1, 2000, at approximately 1:00 a.m., he was on duty sitting alone in his parked squad car on the bridge going over the Dan Ryan Expressway, about 15 feet west of the "L" station. At approximately 1:10 a.m., he observed a 1990 Pontiac proceed westbound on 35th Street, slow down, and come to a stop. Officer Lukensmeyer did not see the car's brake lights activate. Based on this observation, Officer Lukens-

meyer activated his MARS lights, take down lights, and his bright headlights onto the rear of the Pontiac after it had turned onto Wentworth. While behind the vehicle, Officer Lukensmeyer saw the driver lean forward twice towards the dashboard. The car then pulled over.

After the car was curbed, Officer Lukensmeyer approached the driver's side of the car, told both the driver and respondent, who was passenger, not to move, and asked the driver for his license. The driver responded that he did not have his driver's license with him. Officer Lukensmeyer asked the driver to step out of the car and placed him under arrest. After handcuffing the driver, the officer took him to the rear of the vehicle. At some point during the traffic stop, Officer Lukensmeyer learned that the driver owned the vehicle. Officer Lukensmeyer then went to the front passenger's side of the car where respondent was seated. He asked respondent to exit the vehicle so he could "take charge" of the car and have it towed.

After respondent exited the vehicle, Officer Lukensmeyer immediately asked respondent to step to the rear of the vehicle, where they had a conversation. Officer Lukensmeyer asked respondent, "[w]hat's your name. Where you [sic] coming from?" Respondent responded by asking the officer why he was arresting the driver. During the conversation, respondent and the officer were about one foot away from each other. As the conversation continued, Officer Lukensmeyer shined his flashlight into respondent's face twice. Both times Officer Lukensmeyer saw a small, clear, and plastic item containing something white in respondent's mouth. Based on his experience Officer Lukensmeyer knew that the white substance in respondent's mouth was either heroin or cocaine. Officer Lukensmeyer told respondent that he was under arrest and instructed him to spit the object out of his mouth. Respondent spit out one clear plastic bag containing a white powder into Officer Lukensmeyer's hand. When the object

was out of respondent's mouth, Officer Lukensmeyer believed it to be heroin.

After respondent spit out the bag, Officer Lukensmeyer handcuffed him and then called for an assistance unit. He went back into the car where the driver had leaned forward and found two additional bags in a hole in the dashboard similar to the one recovered from respondent. The bags recovered from the car also contained a white powder, which he again believed was heroin. At that time, respondent told Officer Lukensmeyer, "all the heroin you found is mine."

After Officer Lukensmeyer testified, the People rested their case-in-chief for the trial and respondent rested on the motion to quash arrest and suppress evidence. In support of the motion, respondent first argued that Officer Lukensmeyer did not have probable cause to ask respondent to exit the vehicle or to step to the rear of the vehicle. Respondent also questioned Officer Lukensmeyer's motives for making those requests and for asking respondent questions. Respondent argued that, if Officer Lukensmeyer's purpose for asking respondent to exit the vehicle was to have it towed, he should have allowed respondent to walk away instead of taking him to the rear of the vehicle since he was not suspected of committing any crime. Finally, respondent argued that, because Officer Lukensmeyer did not initially ask respondent questions to "allay" his suspicions before asking him to spit out the object in his mouth, what the officer did was "definitely a violation of *Terry*."

The People argued that the officer's actions were both reasonable and legally permissible. Specifically, the People argued that the officer was in the best position to determine what would happen to the vehicle once the owner was arrested. Additionally, the People argued that asking the passenger to go to the rear of the vehicle was a minimal intrusion on respondent. In responding to

respondent's allegations that the officer's conversation with respondent was an "interrogation," the People noted that "respondent engaged the officer in conversation" by asking questions.

The trial court denied respondent's motion. In doing so, the court found that "the officer's testimony was straight forward and credible".

Next, the court found that it was reasonable and legally permissible for Officer Lukensmeyer to: (1) approach the respondent; (2) ask the respondent his identity; and (3) ask respondent to step to the rear of the vehicle. With the latter point, the court explained that asking respondent to step to the rear of the vehicle was reasonable because "[o]bviously the [driver] is under arrest at the time and the officer by himself at 1:00 o'clock in the morning has an obligation to keep tabs on that individual."

In addressing the conversation, the court found that the officer "has numerous reasons to be conducting conversations with the respondent, including explaining to him the reasons for the arrest[,] to determine whether or not who he is [sic] so that perhaps he can be an alternate driver." Additionally, if respondent was to be an alternative driver, the officer was responsible for determining if that driver is: (1) impaired; (2) licensed to drive; and (3) able to drive.

Finally, the court addressed probable cause to arrest. The court commented that the officer saw the object in respondent's mouth twice. At this point, the court found that it is no longer a *Terry* situation because "it's more likely than not that a crime had been committed." Based on what the officer saw, and where he saw it, the court found that there was probable cause to arrest.

After the trial court's pronouncement on the motion, respondent testified for purposes of the trial. After hearing respondent's testimony and counsels' arguments, the trial

court found respondent guilty. The court restated its belief that the officer was credible.

Respondent appealed to the Illinois Appellate Court. The Appellate Court reversed, holding that the motion to quash arrest and suppress evidence should have been granted. (App. B at 27). Specifically, the Appellate Court determined that the officer's actions were unconstitutional because he (1) had no valid authority to have respondent exit the vehicle; (2) had no lawful authority to ask respondent his identity; and (3) did not have probable cause to arrest respondent based on his observations.

Petitioner filed a timely petition for leave to appeal to the Illinois Supreme Court. The Illinois Supreme Court affirmed the ruling of the Illinois Appellate Court. (App. A at 1). Specifically, the Illinois Supreme Court held that the officer's questioning of respondent was "unreasonable within the meaning of the fourth amendment," because the purpose of the stop had concluded before the officer began questioning respondent and the questioning was not related to the stop. (App. A at 9, 13) Justice Thomas dissented, and gave his view that the encounter was purely consensual. He believed that *Florida v. Bostick*, 501 U.S. 429 (1991), was the proper model for decision.

Petitioner now seeks a writ of certiorari to review the judgment and order of the Illinois Supreme Court.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A POLICE OFFICER MAY QUESTION A PASSENGER OF A VEHICLE LAWFULLY STOPPED FOR A TRAFFIC VIOLATION AFTER THE PURPOSE OF THE STOP HAS BEEN COMPLETED AND THE OFFICER HAS ARRESTED THE DRIVER AND DECIDED TO IMPOUND THE VEHICLE, EVEN THOUGH THE OFFICER DOES NOT HAVE ANY REASONABLE SUSPICION THAT THE PASSENGER HAS ENGAGED IN CRIMINAL ACTIVITY.

This Court should grant review to resolve whether the Fourth Amendment permits a police officer to question a passenger of a vehicle lawfully stopped for a traffic violation and request his identification after the officer has arrested the driver and decided to impound the vehicle, even absent reasonable suspicion that the passenger has engaged in criminal activity. Although this Court emphasized in *United States v. Drayton*, 536 U.S. 194, 201 (2002) that "[e]ven when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means," lower courts across the country are currently divided as to whether police officers may ask such questions once the purpose of a lawful traffic stop has been satisfied. Moreover, where a passenger's freedom of movement is restricted by circumstances other than police conduct directed towards him, Petitioner maintains that there is nothing coercive about a police officer questioning a passenger in such a situation in order to make arrangements for the passenger's safe arrival at his final destination.

A.

The Illinois Supreme Court's decision reflects the nationwide confusion regarding the ability of police officers to question automobile passengers when conducting routine traffic stops.

The Illinois Supreme Court, applying its earlier Fourth Amendment precedent in *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003), held that once the purpose of the traffic stop is completed, the officer may no longer question the passenger. Illinois courts use *Terry v. Ohio*, 392 U.S. 1 (1968) to assess the reasonableness of a traffic stop. Under that analysis, a reviewing court must determine "(1) whether the officer's action was justified at its inception" and (2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." App. A at 6, quoting *Terry*, 392 U.S. at 19-20. Implicit in this analysis is, of course, an assumption that a traffic stop involves a Fourth Amendment "seizure" of both the driver and the passenger.

In the courts below, respondent conceded Lukensmeyer's authority to make the traffic stop and order respondent out of the car. App. A at 7. The Illinois court accordingly turned its attention to the second or "scope" prong of the *Terry* analysis which considers the length of the detention and the manner in which it had been conducted. Having rejected the State's argument that this was a consensual encounter between a police officer and a citizen, *see* App. A at 10, the court concluded that Officer Lukensmeyer improperly prolonged respondent's detention, and improperly questioned respondent about any matter at all, after the purpose of the traffic stop had been concluded—that is, after Lukensmeyer had arrested the driver and had decided to tow the car. The court specifically held that Lukensmeyer had violated the Fourth Amendment when, while shining a flashlight in respondent's face, Lukensmeyer asked respondent for identification and his

travel history. See App. A at 12. The court also decided that the officer's actions were improper because, lacking reasonable suspicion that respondent himself had committed any crime, the officer's questions ("what's your name? Where you [sic] coming from?") were not reasonably related to the purpose of the traffic stop. App. A at 9.

In dissent, Justice Thomas concluded that *Terry* did not govern this case at all and chastised the majority's failure to follow (or even acknowledge) *Florida v. Bostick*, 501 U.S. 429 (1991).[1] In *Bostick*, this Court held that a police officer may approach a citizen, ask him questions and examine his identification, and even ask for consent to search his belongings. The encounter remains a consensual one, and does not constitute a Fourth Amendment seizure for which reasonable suspicion is required, as long as the citizen is free to decline to answer the officer's questions or otherwise terminate the encounter. *Id.* at 436. As noted above, respondent here did in fact refuse to answer one of Officer Lukensmeyer's questions, and he even asked the officer a question of his own. App. A at 20. Equally important, in *Bostick* the defendant's freedom of movement was restricted by "a factor independent of police conduct—*i.e.*, by his being a passenger on a bus". 501 U.S. at 436. As Justice Thomas observed, Bunch was stranded, not as result of state action but simply because he had the misfortune to be a passenger in car driven by

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[1] In her partial concurrence and dissent, Justice Garman "split the difference" and concluded that, although respondent was subjected to a Fourth Amendment seizure of his person, a police officer may ask a passenger "factually innocuous" questions, as long as those questions are related to the purpose of the traffic stop and are not designed to elicit an incriminating response. Although she concluded that Lukensmeyer's questions were not improper, Justice Garman also concluded that Lukensmeyer improperly prolonged respondent's detention when, with a show of authority, Lukensmeyer shined a flashlight in respondent's face and asked him those questions. App. A at 13-17.

a person who could not produce a valid driver's license. App. A at 19. *See also INS v. Delgado*, 466 U.S. 210, 218 (1984) (where INS agents did not unconstitutionally detain factory workers because "voluntary obligations to their employers," rather than a show of law enforcement authority, kept workers at their work sites while officers asked them questions).

Moreover, it is clear that Officer Lukensmeyer did not coerce respondent's cooperation in any way. As the Illinois Supreme Court recognized, "prior to [respondent]'s arrest, the officer did not draw his gun, place [respondent] in handcuffs, physically touch [respondent], or indicate in any way that [respondent] was suspected of criminal conduct." App. A. at 12. Similarly, the fact that the officer had already arrested the driver cannot negate the consensual nature of the encounter because "[t]he arrest of one person does not mean that everyone around him has been seized by police." *Drayton*, 536 U.S. at 206 (noting that even after arresting the defendant's seatmate on the bus, the officer addressed the defendant in a polite manner and provided him with no indication that he was required to answer the questions).

Nevertheless, the Illinois court's splintered views accurately mirror the general confusion within the law at the present time. In *Brown v. Texas*, 443 U.S. 47 (1979), this Court held that a police officer must have reasonable suspicion to detain a person on the street and ask him for identification. This Court has also held that *Terry* governs traffic stops, adding that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] [Amendment], even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse,* 440 U.S. 648, 653 (1979), as cited in *Berkemer v. McCarty*, 468 U.S. 420, 436-37 (1984) (also holding that *Miranda* warnings are not required to enable an officer to ask a motorist "a moderate

number of questions" about the traffic violation and to determine his identity).

In *Maryland v. Wilson*, 519 U.S. 408 (1997), however, this Court decided that, to assure his personal safety, an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. *Id.* at 414-15. The *Wilson* court declined to decide whether an officer may forcibly detain a passenger for the entire duration of the stop, raising the inevitable question of whether an officer can request identification or ask him other questions. *Id.* at 414-15, n.3.

The lower courts have struggled to supply an answer, and, in doing so, the courts have not drawn any distinction between drivers and passengers when assessing the reasonableness of an officer's actions during a traffic stop. Addressing itself to the "scope" prong of the *Terry* analysis, the Ninth Circuit held that a police officer may ask a driver only those questions that are "reasonably related in scope to the justification for the traffic stop." Reasonable suspicion of criminal activity is required if the officer wishes to ask any other questions. *See United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001) (where reasonable suspicion ultimately justified the officer's questions about alcohol, weapons, or narcotics), *cert. denied*, 535 U.S. 948 (2002).

Deciding what types of questions are "reasonably related" to the purpose of the traffic stop inevitably raises difficulties, however. Although the Illinois Supreme Court concluded that the questions "what's your name?" and "where you [sic] coming from?" were objectionable, even the courts applying a *Terry* analysis have adopted *per se* rules permitting such questions. The Eighth Circuit, for example, ruled that questions designed to ascertain the individual's identity and travel plans are generally acceptable. *See United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994) (deciding that, after he saw the passenger

commit a traffic violation, the officer could question both the driver and the passenger to ascertain their identities and destination, adding that inconsistent answers may give rise to the reasonable suspicion needed to permit more intrusive questioning), *cert. denied*, 514 U.S. 1134 (1995). *See also United States v. Williams*, 271 F.3d 1262, 1267 (10th Cir. 2001), *cert. denied*, 535 U.S. 1019 (2002) (citing additional cases) (surveying the law and holding that "questions relating to a driver's travel plans ordinarily fall within the scope of a traffic stop"); *United States v. Carrasco*, 236 F. Supp. 2d 1283, 1287 (D. N.M. 2002) (because the officer needed to arrange for transportation of the passenger, questions about the passenger's identification, residence, and his reason for travel were reasonably related to the purpose of the traffic stop, even after the driver had been arrested).

In *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001) (*en banc*), *cert. denied*, 535 U.S. 1019 (2002), in turn, a case containing six different opinions, the Tenth Circuit refused to abandon the *Terry* "scope" limitation and eventually decided that, as a matter of public policy, an officer can always ask a motorist if he is carrying a loaded weapon. Given the fact that the court was concerned about the "legitimate and weighty" interest in officer safety, *id.* at 1224, it would appear that *Wilson* gives the officer the authority to pose the same question to a passenger, as well. *See id.* at 1237 (Henry, J. concurring and making the same point). But the two separate majorities of the *en banc* court were sharply divided on the question whether, as a general rule, an officer may inquire about a motorist's travel history and intended destination. *Id.* at 1221, 1228 n.2, 1237. With the exception of *Holt*, the courts in the cases cited above did not mention *Bostick* at all. *See Holt*, 264 F.3d at 1229 (contrasting a non-consensual encounter with an automobile passenger with a consensual encounter with a bus passenger).

Other courts have taken an entirely different approach predicated, at least in part, on this Court's observation that "since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure". *Bostick*, 501 U.S. at 434. In *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993), for example, the Fifth Circuit agreed that a traffic stop constitutes a seizure to which *Terry* applies, but then held that the Fourth Amendment does not prevent the officer from asking questions about anything he pleases. Relying heavily on *Bostick*, the court did not analyze the case in terms of *Terry's* "scope" prong, but instead ruled that the Fourth Amendment serves to prevent unreasonable detentions, not police questioning. *Id.* at 436. Even absent reasonable suspicion, the court concluded, police questioning about any subject that does not prolong the detention beyond the circumstances that justified its initiation is permitted. *Id.* at 436-37. The *Shabazz* court ultimately concluded that the officers could question both the driver and the passenger about their recent whereabouts—and look for inconsistencies in their answers—while they conducted a computer check of the driver's license and registration.

Following *Shabazz*, the *en banc* Seventh Circuit has similarly ruled that, because questions are not seizures, police officers need not demonstrate justification for each and every inquiry made during a traffic stop. In other words, the content of the questions themselves is not a matter of constitutional concern. Questions asked during a detention may affect the reasonableness of that detention, and may eventually result in a Fourth Amendment violation, but questions that do not increase the length of the detention, or which extend it only by a brief period of time, do not render the detention itself unconstitutional. *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) (*en banc*) (police officer could ask a passenger if he were carrying drugs), *cert. denied*, 537 U.S. 829 (2002). *See also*

State v. Hickman, 763 A.2d 330, 337-38 (N.J. Sup. Ct. 2000) (citing *Bostick* and holding an officer may question a passenger about any subject, including guns and contraband, so long as questioning does not extend the duration of the stop).

Other courts ignore the content of the questions asked and instead focus on the duration of the detention, but in doing so, those courts have reached markedly different results. *Compare State v. Griffith*, 613 N.W.2d 72, 81 (Wisc. 2000), *cert. denied*, 531 U.S. 1082 (2001) (following *Bostick* and holding that, even though the traffic stop resulted in a Fourth Amendment seizure of the passenger, a police officer could ask a passenger to give his name and date of birth, even after the driver had been arrested, in order to determine if the passenger could drive the car; this "incremental liberty intrusion" did not unreasonably prolong the passenger's detention or convert a reasonable seizure into an unreasonable one); *People v. Cartwright*, 85 Cal. Rptr. 2d 788, 794 (Cal. App. 1999) (citing *Bostick* and deciding that an officer's request for identification, and a query "whether the car contained anything illegal", did not constitute a show of authority; a traffic stop is not a Fourth Amendment seizure of a passenger unless the passenger submits for reasons wholly attributable to some other show of authority); *People v. Jackson*, 39 P.3d 1174 (Colo. 2002) (deciding a traffic stop and request for identification did not constitute a Fourth Amendment seizure of a passenger, despite flashing lights and overhead sirens used to make the traffic stop, but the officer did need reasonable suspicion to order a passenger to remain in the car pending a computerized warrant check of a tendered identification); *State v. O'Day*, 955 P.2d 860, 864 (Wash. App. 1998) (after *Bostick*, an officer's request for identification, made to determine the passenger's ability to drive the car rather than for any investigative purpose, did not constitute a seizure, but reasonable suspicion was needed before the officer could take the passenger's purse and

ask her if it contained drugs or weapons) *with Graham v. Maryland*, 705 A.2d 82, 94 (Md. App. 1998) (ignoring *Bostick* and deciding that an officer who lacked reasonable suspicion could not detain a passenger for 25 minutes after the driver had been arrested, and before the arrival of a canine unit, but assuming in *dicta* that the officer could inquire whether the passenger had a license and could remove the vehicle from the highway).

B.

The Illinois court's ruling that the illumination of a person by a police officer amounts to a show of authority is inconsistent with this Court's Fourth Amendment jurisprudence.

The *Bunch* majority below placed special emphasis on the fact that Officer Lukensmeyer shined a flashlight in respondent's face when he asked him questions. Without this particular fact, the Illinois Supreme Court would have been hard-pressed to find *any* objectionable show of authority on the part of Officer Lukensmeyer. App. A at 12. After all, *Wilson* authorized Lukensmeyer to order respondent to exit and move to the rear of the automobile. Moreover, it is not unreasonable for an officer working alone at one o'clock in the morning to use a flashlight to illuminate the area as a precautionary measure and ensure his personal safety. As long as Lukensmeyer was engaged in permissible activity when he ordered respondent out of the car and asked him these questions, Lukensmeyer's flashlight (like the police sirens in *Jackson*) did not convert an otherwise consensual encounter into a unconstitutional seizure. In *Texas v. Brown*, 460 U.S. 730, 739-40 (1983), this Court agreed with "[n]umerous other courts" and held "that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection." *See also United States v. Lee*, 274

U.S. 559, 563 (1927) (the use of a searchlight by the Coast Guard to illuminate a boat at sea did not constitute an unreasonable search under the Fourth Amendment).

Similarly, in *Baldwin v. Commonwealth*, 413 S.E.2d 645, 649-50 (Va. 1992), the Virginia Supreme Court held that the officer's use of a spotlight coupled with a direction to "come over here" was not a show of authority raising Fourth Amendment concerns, because "this circumstance was no more an 'intimidating' show of authority than the 'presence of a police officer driving parallel to a running pedestrian' ". *Id.*, quoting *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988). *See also State v. Young*, 957 P.2d 681, 688-89 (Wash. 1998) (where a deputy sheriff saw the defendant standing on a street corner in an area of high narcotics activity and shined a spotlight on the defendant, the Washington Supreme Court held that the shining of the spotlight did not constitute a seizure of the defendant in violation of the Fourth Amendment). *But see Chase v. State*, 656 So.2d 588, 589 (Fla. App. 1995) (holding that where an officer identified his office in a loud voice and shined his flashlight in the defendant's face, the officer's actions were a "show of official authority" such that a reasonable person would not have felt free to leave).

Every day across the country, police officers make thousands of routine stops of motorists who are violating traffic laws. No doubt many of these motorists have passengers riding with them. Police officers need to know when, and under what circumstances, they can question those passengers, ask for identification, and obtain other information. In some situations, like the case at bar, the passengers' dilemma will be created not by state action but rather because they find themselves stranded at the side of the road with no transportation to their final destination. Police officers should be permitted to do something to assist those passengers. *See generally South Dakota v. Opperman*, 428 U.S. 364, 368 (1976), citing

Cady v. Dombrowski, 413 U.S. 433 (1973) (both discussing a police officer's "community caretaking function" to promote community safety, a function which permits an officer to engage in certain actions when a car must be towed and inventoried). *Cf. United States v. Rideau*, 949 F.2d 718, 720 (1991), *rev'd on other grounds*, 969 F.2d 1572 (5th Cir. 1992) (*en banc*), citing ABA Standards for Criminal Justice, Standard §1-2.2 at 31-32 (2d ed. 1980) (deciding that officers could stop an intoxicated person wearing dark clothing who was standing in the middle of the road at night, adding that police officers must "aid individuals who are in danger of physical harm, assist those who cannot care for themselves, and provide other services on an emergency basis"). The lower courts have grappled with these questions, but no clear consensus has emerged or seems likely to emerge.[2] Accordingly, this Court should

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[2] This Court may not have an opportunity to resolve these questions in *Hiibel v. Nevada*, 59 P.3d 1201 (Nev. Sup. Ct. 2002) *(en banc), cert. granted*, No. 03-5554, 2003 U.S. LEXIS 7710 (October 20, 2003). *Hiibel* does not involve a traffic stop and does not address the central issue in this case, *viz.* whether a police officer may request identification and question a passenger during a traffic stop. Moreover, both Illinois and Nevada have statutes that permits a police officer to ask for identification during a *Terry* stop. *See* 725 ILCS 5/107-14. Unlike Nevada, however, the Illinois statute does not require the citizen to provide that identification, and the citizen is free to terminate the encounter and walk away. *See Hiibel*, 59 P.3d at 1203, construing Nev. Rev. Stat. §171.123(3) (2002). As a result, the instant case represents the decidedly more common situation, in which a reviewing court must assess the reasonableness of an officer's inquiries when, like *Bostick* but unlike *Hiibel*, the individual is free to refuse to answer the officer's questions. Moreover, Petitioner concedes that Officer Lukensmeyer did not have any reasonable suspicion to conclude that respondent was engaged in any criminal activity. This fact, too, distinguishes *Hiibel* and brings this case within the ambit of the vast majority of police-

(continued...)

grant certiorari review to provide its authoritative guidance and to resolve these open and important questions.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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(...continued)
citizen encounters. This Court should grant *certiorari* in this case to supplement its decision in *Hiibel*.

APPENDIX

Appendix A

Docket No. 93472–Agenda 5–November 2002.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. BERNARD BUNCH, Appellee.

Opinion filed August 21, 2003.

JUSTICE FITZGERALD delivered the opinion of the court:

Following a bench trial in the circuit court of Cook County, defendant Bernard Bunch was convicted of possession of a controlled substance and sentenced to a four-year term of imprisonment. The appellate court determined that the trial court erred in denying defendant's motion to quash arrest and suppress evidence and reversed defendant's conviction. 327 Ill. App. 3d 979. We allowed the State's petition for leave to appeal (see 177 Ill. 2d R. 315) and now affirm.

BACKGROUND

Defendant's motion to quash arrest and suppress evidence proceeded simultaneously with his trial. Officer Lukensmeyer testified that at 1:10 a.m. on February 1, 2000, he was working alone in a marked police vehicle in the area of 35th Street and Wentworth Avenue in Chicago. He observed a 1990 Pontiac, which was proceeding westbound on 35th Street, slow down and come to a brief stop. Lukensmeyer did not see the car's brake lights activate. As the Pontiac continued on its way, Lukensmeyer shined his MARS lights, his take-down lights, and his bright headlights onto the rear of the car. Lukensmeyer testified that he saw the driver lean forward twice toward the dashboard before the driver pulled the vehicle over and stopped. One

other person was in the car, defendant, who was in the front passenger seat. Lukensmeyer approached the vehicle on the driver's side and commanded to both, "Don't move." Lukensmeyer then asked the driver for his license. When the driver could not provide a license, Lukensmeyer asked him to step out of the vehicle and placed him under arrest. He handcuffed the driver and walked him to the rear of the car.

According to Lukensmeyer, he then walked around to the passenger side and asked defendant to exit the car and step to the rear of the vehicle, where the driver was standing. Lukensmeyer testified that he asked defendant out of the car so that he could take charge of the vehicle, *i.e.*, because the driver was arrested Lukensmeyer was going to have the car transported to the station where it would be towed to an impound lot. At some point during the traffic stop, Lukensmeyer learned that the driver was the owner of the vehicle, but he could not recall whether this occurred before or after he asked defendant to exit the car.

Lukensmeyer testified further that after defendant exited the vehicle, he asked him, "What's your name? Where you [*sic*] coming from?" When questioned as to why he asked defendant his name, Lukensmeyer responded, "I'm a policeman[.] I want[ed] to know who he was and I was curious to find out exactly who he was. That's all."

Defendant provided his name and additionally asked Lukensmeyer why the driver was being arrested. Lukensmeyer answered defendant's question. During this conversation, in which the two men were about one foot apart, Lukensmeyer twice shined his flashlight in defendant's face. Lukensmeyer explained that when he is working nights, he shines his flashlight in everyone's face because there is a "[s]trong possibility they may have something in their mouths." Lukensmeyer denied that he questioned defendant merely to see if there was anything

in defendant's mouth. Both times Lukensmeyer shined his flashlight in defendant's face, he observed a small, clear plastic item, containing something white, in defendant's mouth. Based on 35 years of experience as a police officer and his participation in more than 2,000 narcotics arrests, Lukensmeyer believed that the white substance was either heroin or cocaine. Lukensmeyer informed defendant he was under arrest, and ordered him to spit the object out of his mouth, which he did. Lukensmeyer recovered one plastic bag containing a white powder. Lukensmeyer handcuffed defendant and called for assistance. During his search of the Pontiac, Lukensmeyer recovered two similar plastic bags, also containing what he believed to be heroin, from a space in the dashboard. At this point, according to Lukensmeyer, defendant made an unsolicited statement that "[a]ll the heroin you found is mine." Lukensmeyer later tested the brakes on defendant's vehicle, which were working properly. The parties stipulated to the chain of custody and that the white powder tested positive for the presence of heroin.

In connection with his motion to quash arrest and suppress evidence, defendant argued that the officer did not have probable cause to ask him to exit the vehicle, to step to the rear of the car, or to interrogate him. The State maintained that moving defendant to the rear of the vehicle was minimally intrusive and that no interrogation took place. Rather, defendant engaged the officer in conversation.

The trial court denied defendant's motion. In its oral ruling, the trial court indicated that it found the officer's testimony straightforward and credible. The trial court concluded that there was nothing impermissible in asking defendant his name and that moving defendant to the rear of the car had no legal significance. The trial court further noted that the officer had numerous reasons to have a conversation with defendant, including explaining to him

the reason for the arrest and determining if defendant could be an alternative driver. According to the trial court, shining the flashlight in defendant's face merely allowed the officer to assess defendant at 1 o'clock in the morning. Finally, the trial court found that the officer had probable cause to arrest defendant, based on his observation of the object in defendant's mouth.

Following the trial court's denial of defendant's motion, the bench trial continued with defendant's testimony. Defendant offered a different version of the vehicle stop. Defendant testified that when the driver of the vehicle, his brother, asked Officer Lukensmeyer why he stopped them, the officer replied, "Because I saw two black men in the car." The officer made no mention of the Pontiac's brake lights and never examined them. According to defendant, after arresting and cuffing his brother, Lukensmeyer placed his brother in the police vehicle. He then approached defendant and asked him to get out of the car. Once outside the vehicle, Lukensmeyer told defendant to turn around and then placed handcuffs on him, saying that it was for the officer's own safety. As Lukensmeyer spoke to him, the officer shined a flashlight in defendant's face. Defendant testified that he did not have anything in his mouth and that the officer never asked him to spit out anything. After placing defendant in the police car, Lukensmeyer removed a black case from the trunk and returned to the Pontiac. A short while later, Lukensmeyer returned to the police car and told defendant and his brother that he found drugs inside their car. Defendant denied having narcotics in his possession that day and denied telling Lukensmeyer that any drugs in the car belonged to him.

The trial court found defendant guilty of possession of a controlled substance and subsequently sentenced him to a four-year term of imprisonment. The appellate court reversed, concluding that the arrest of defendant violated the fourth amendment to the United States Constitution

(U.S. Const., amend. IV). 327 Ill. App. 3d at 983-84. The appellate court stated, in relevant part:

> "[A] police officer has to have some lawful authority to ask a defendant for identification ***.
>
> In this case, the officer did more than ask for identification. He ordered the defendant out of the car and to the rear of it because he was 'curious.' The defendant submitted. We believe the defendant was detained at that point without lawful authority. Curiosity is not a good reason to detain. Everything that flowed directly from that unlawful detention must be suppressed." 327 Ill. App. 3d at 983.

For the reasons discussed below, we affirm the judgment of the appellate court.

ANALYSIS

I

Generally, a trial court's ruling on a motion to suppress will not be disturbed unless it is manifestly erroneous. This deferential standard applies when the disposition of the suppression motion turns on factual determinations and credibility assessments. Where, however, no dispute exists as to the facts or witness credibility, the trial court's ruling will be reviewed *de novo*. *People v. Anthony*, 198 Ill. 2d 194, 200-01 (2001); *People v. Gonzalez*, 184 Ill. 2d 402, 411-12 (1998). In the present case, the trial court found Officer Lukensmeyer's testimony credible. Such finding was not manifestly erroneous. Accordingly, we conduct *de novo* review under the officer's version of events. See *People v. Love*, 199 Ill. 2d 269, 274-75 (2002); *Gonzalez*, 184 Ill. 2d at 412.

II

Before considering the merits of this appeal, we briefly review the principles relevant to deciding whether a vehicle stop comports with fourth amendment jurisprudence.

The temporary detention of individuals—passengers and drivers alike—during a vehicle stop constitutes a "seizure" of "persons" within the meaning of the fourth amendment. *People v. Gonzalez*, 204 Ill. 2d 220, 225 (2003), citing *Whren v. United States*, 517 U.S. 806, 809-10, 135 L. Ed. 2d 89, 95, 116 S. Ct. 1769, 1772 (1996). Vehicle stops are, therefore, subject to the fourth amendment's requirement of reasonableness. Because a traffic stop is more analogous to a *Terry* investigative stop (see *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)) than to a formal arrest, the reasonableness of a traffic stop is analyzed under *Terry* principles. *Gonzalez*, 204 Ill. 2d at 226. A *Terry* analysis involves a dual inquiry: "(1) 'whether the officer's action was justified at its inception,' and (2) 'whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' " *Gonzalez*, 204 Ill. 2d at 228, quoting *Terry*, 392 U.S. at 19-20, 20 L. Ed. 2d at 905, 88 S. Ct. at 1879.

In this case, no issue exists concerning the lawfulness of the initial stop of the vehicle—the first prong of the *Terry* analysis. Rather, this appeal concerns the lawfulness of the officer's conduct following the initial stop, and thus concerns the second prong of the *Terry* analysis. Under the second prong we consider the *length* of the detention and the *manner* in which it was carried out. *Gonzalez*, 204 Ill. 2d at 233. That is, " 'an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop,' " and " 'the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.' " *Gonzalez*, 204 Ill. 2d at 233, quoting

Florida v. Royer, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238, 103 S. Ct. 1319, 1325-26 (1983) (plurality op.). With these principles in mind, we consider the State's arguments on appeal.

A

The State first maintains that Officer Lukensmeyer could lawfully direct defendant to exit the vehicle. See *Maryland v. Wilson*, 519 U.S. 408, 415, 137 L. Ed. 2d 41, 48, 117 S. Ct. 882, 886 (1997) (holding that, consistent with the fourth amendment, "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop"); *Gonzalez*, 184 Ill. 2d at 420 (following *Wilson* and holding that the officer's command to the passenger of a lawfully stopped vehicle to return to the car was not an unreasonable seizure); *People v. Sorenson*, 196 Ill. 2d 425, 433 (2001) ("it is well established that following a lawful traffic stop, police may, as a matter of course, order the driver and any passengers out of the vehicle pending completion of the stop without violating the protections of the fourth amendment").

Defendant concedes that Officer Lukensmeyer could lawfully direct defendant to exit the vehicle so that the officer could take charge of the car and have it towed. In light of defendant's concession, there is no reason to consider this point further.

B

The State next argues that the officer's questioning of defendant, after he exited the vehicle, did not implicate fourth amendment protections. In analyzing this issue, we consider our recent decision in *People v. Gonzalez*, 204 Ill. 2d 220 (2003).

In *Gonzalez*, police stopped a vehicle for not having a front license plate. While one of the officers processed the driver, the other officer approached the passenger, who was not suspected of any criminal conduct, and requested identification. The passenger complied, and the ensuing encounter between the officer and the passenger resulted in a search of the passenger's person, revealing a packet of cocaine. The passenger was arrested and charged. The passenger later challenged the officer's request for identification, arguing that it was an unreasonable seizure under our federal and state constitutions. See U.S. Const., amend. IV; Ill. Const. 1970, art. I, §6.

In resolving the passenger's constitutional challenge, we formulated the following general framework for analyzing whether police questioning during the course of a traffic stop satisfies the second prong of the *Terry* analysis:

> "[W]e must consider, as an initial matter, whether the question is related to the initial justification for the stop. If the question is reasonably related to the purpose of the stop, no fourth amendment violation occurs. If the question is not reasonably related to the purpose of the stop, we must consider whether the law enforcement officer had a reasonable, articulable suspicion that would justify the question. If the question is so justified, no fourth amendment violation occurs. In the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion, we must consider whether, in light of all the circumstances and common sense, the question impermissibly prolonged the detention or changed the fundamental nature of the stop." *Gonzalez*, 204 Ill. 2d at 235.

We concluded in *Gonzalez* that no fourth amendment violation occurred. Although the request for identification was not related to the purpose of the stop or supported by a reasonable, articulable suspicion of criminal conduct, the

request did not prolong the passenger's detention because it was made during the course of the stop while the driver was being processed. Further, the facially innocuous question, which the passenger could decline to answer, did not change the fundamental nature of the stop. *Gonzalez*, 204 Ill. 2d at 236.

Applying the *Gonzalez* framework to the facts in the present case, we reach a different result. We note first that the questions the officer put to defendant ("What's your name? Where you [*sic*] coming from?") were not related to the purpose of the stop—operating a vehicle without brake lights. The officer's questions also were not supported by a reasonable articulable suspicion of criminal conduct. Prior to being approached by Officer Lukensmeyer, defendant was simply a passive occupant of the car. Although the trial court indicated that the officer had "numerous" reasons to have a conversation with defendant, including explaining to him the reason for the arrest and determining if defendant could be an alternative driver, the questions the officer actually posed were not objectively related to either of these reasons.

Because the questioning of defendant was not related to the stop and not supported by a reasonable, articulable suspicion of criminal conduct, we must consider whether the questioning prolonged defendant's detention or changed the fundamental nature of the stop. See *Gonzalez*, 204 Ill. 2d at 236. Significantly, in *Gonzalez*, the officer's request for identification took place while the driver was being processed and the purpose of the stop had yet to be completed. Thus, the officer's request did not prolong the passenger's detention. In contrast, the questioning of defendant in the present case occurred *after* the purpose of the stop was concluded. That is, the questioning occurred after the driver had been placed under arrest, the officer had already decided to have the car towed, and defendant

was directed to exit the vehicle for that purpose. Thus, unlike the request put to the passenger in *Gonzalez*, the officer's questioning of defendant in the instant case fails to satisfy the second prong of the *Terry* analysis because it prolonged defendant's detention beyond the completion of the purpose of the stop.

The State maintains, however, that the initial detention of defendant, incidental to the stop of the vehicle, ended when defendant exited the car. What followed, according to the State, was a consensual conversation between defendant and the officer. We disagree. In reaching this conclusion, we are guided by our decision in *People v. Brownlee*, 186 Ill. 2d 501 (1999).

In *Brownlee*, police stopped a vehicle for a traffic violation. Officers Guerrero and Maxey obtained the identities of the driver and the three passengers. The officers checked for outstanding warrants, found none, and decided not to issue any traffic citations. The officers decided, however, to ask the driver for permission to search the car. After the driver consented to the search, all of the occupants were ordered out of the car. The search revealed marijuana and all four individuals were arrested. One of the passengers moved to quash arrest and suppress evidence, arguing that the continued detention and search of the car were unrelated to the original basis for the vehicle stop and any consent was the product of the unlawful detention. The circuit court granted the motion; the appellate court reversed. *People v. Brownlee*, 293 Ill. App. 3d 315 (1997).

On appeal to this court, the State maintained that the conclusion of the traffic stop was merely followed by a consensual conversation between the officer and the driver that resulted in a voluntary consent to search the vehicle. In other words, the driver was not seized when he gave consent to search the vehicle. *Brownlee*, 186 Ill. 2d at 516. We rejected this argument.

We proceeded from the well-established proposition that a person is seized "'when, by means of physical force or a show of authority,' that person's 'freedom of movement is restrained.' " *Brownlee*, 186 Ill. 2d at 517, quoting *United Stated v. Mendenhall*, 446 U.S. 544, 553, 64 L. Ed. 2d 497, 509, 100 S. Ct. 1870, 1877 (1980). In determining whether the driver was seized at the point that he gave consent to search the vehicle, we considered whether "'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *Brownlee*, 186 Ill. 2d at 517, quoting *Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509, 100 S. Ct. at 1877.

The facts in *Brownlee*, as established by the officers' testimony, revealed that, after deciding not to issue any citations, the officers returned to the vehicle. With Officer Guerrero standing on the driver's side of the car, and Officer Maxey standing on the passenger side, Guerrero returned to the driver his license and insurance card and explained that no citations would be issued. Although the traffic stop at that point had concluded, the officers continued to flank the vehicle and paused for a couple of minutes, saying nothing. Following this pause, Guerrero asked the driver for permission to search the vehicle. We determined that, "[g]iven these circumstances, we can find no fault with the circuit court's conclusion that the officers' actions constituted a show of authority such that a reasonable person would conclude that he or she was not free to leave." *Brownlee*, 186 Ill. 2d at 520. We explained that "[a] reasonable person in this driver's situation would likely conclude that, if he or she drove away, then the two officers would soon be in hot pursuit." *Brownlee*, 186 Ill. 2d at 520. We noted that the State made no attempt to show that the officers' continued detention of the vehicle was in any way reasonable or objectively justified, or that the officers' detention was sufficiently limited to satisfy the conditions of a *Terry* investigative seizure. *Brownlee*, 186 Ill. 2d at

521. Accordingly, the illegal detention tainted the subsequent consent to search. *Brownlee*, 186 Ill. 2d at 521.

In the present case, Officer Lukensmeyer's testimony indicates that the purpose of the traffic stop concluded when the officer decided to have the vehicle towed and directed defendant to exit the car. The officer's directions to defendant, however, continued. The officer directed defendant to move to the rear of the vehicle, where the driver--who was already under arrest and handcuffed—was standing. Then, positioning himself just a foot from defendant and shining his flashlight in defendant's face, the officer asked him, "What's your name? Where you [*sic*] coming from?" Given these circumstances, we conclude that the officer's actions constituted a show of authority such that a reasonable person would conclude that he or she was not free to leave.

The State draws our attention to the fact that prior to defendant's arrest, the officer did not draw his gun, place defendant in handcuffs, physically touch defendant, or indicate in any way that defendant was suspected of criminal conduct. Although true, these facts are not dispositive of whether the conversation was consensual. The officer's show of authority, as in *Brownlee*, manifested itself in other ways.

The State also points to the fact that defendant not only responded to one of the officer's questions, but asked the officer his own question—why the driver was being arrested. The State argues that a "reasonable person, if they felt 'seized' *** would not further engage that officer in conversation which is not even related to his own arrest." We do not find defendant's concern about the arrest of the driver—defendant's brother—indicative of whether a reasonable person would feel free to leave. Accordingly, we reject the State's argument that the questioning of defendant was the product of a consensual encounter.

CONCLUSION

For the reasons discussed above, we conclude that defendant's detention, following the conclusion of the purpose of the traffic stop, was unreasonable within the meaning of the fourth amendment, and tainted the resulting discovery of the heroin. We, therefore, affirm the judgment of the appellate court reversing the circuit court's order denying defendant's motion to quash arrest and suppress evidence. Under the circumstances, we do not consider the State's argument that the arrest of defendant was supported by probable cause.

Affirmed.

JUSTICE GARMAN, concurring in part and dissenting in part:

I agree with the majority that the initial seizure of defendant, incidental to the permissible stop of a vehicle in which he was a passenger, was lawful. In addition, despite my joining the special concurrence in *People v. Gonzalez*, 204 Ill. 2d 220 (2003), I agree that this case must be resolved by application of the rule adopted by the *Gonzalez* majority, which is now *stare decisis*. However, unlike the majority, I conclude that the questions asked by the officer were permissible.

When engaged in a lawful traffic stop, an officer may direct a passenger to remain in or to exit the vehicle. See *Maryland v. Wilson*, 519 U.S. 408, 415, 137 L. Ed. 2d 41, 48, 117 S. Ct. 882, 886 (1997); *People v. Sorenson*, 196 Ill. 2d 425, 433 (2001); *People v. Gonzalez*, 184 Ill. 2d 402, 420 (1998). The officer may also question the passenger during the seizure if the questions are either related to the initial justification for the stop or based on reasonable articulable suspicion of the passenger. *Gonzalez*, 204 Ill. 2d at 235. If the questions are not justified on either of these bases,

questioning is permissible only if it does not prolong the detention of the passenger or change "the fundamental nature of the stop." *Gonzalez*, 204 Ill. 2d at 235. Facially innocuous questions that the passenger could decline to answer do not change the stop's fundamental nature. *Gonzalez*, 204 Ill. 2d at 236.

In the present case, the officer asked the passenger's name and where he and the driver were coming from. Although these questions might have been innocuous in nature (slip op. at 13 (Thomas, J., dissenting)), they were asked while the officer was asserting his authority by shining the beam of his flashlight in the defendant's face. Because the stop occurred in the early morning hours and because the officer was alone, I cannot say that it was improper for him to make a show of authority by using his flashlight in this manner. However, because of this display of authority, defendant's answers to the questions cannot be deemed voluntary.

The majority correctly observes that the officer did not ask defendant questions directly related to the purpose of the stop, such as if he had a valid driver's license and was willing and able to drive the car. Further, the officer had no reasonable articulable suspicion of the defendant. Slip op. at 8.

I part company from the majority at this point in the analysis. The majority concludes that the questioning was improper because it occurred "*after* the purpose of the stop was concluded." (Emphasis in original.) Slip op. at 8. In effect, the majority blurs the distinction between the two prongs of the inquiry adopted in *Gonzalez* when it states that the officer "prolonged defendant's detention" (the duration factor) after "the purpose of the stop" (the scope factor) was completed. Slip op. at 8.

There is no suggestion in the record that the two simple questions ("What's your name? Where [are] you coming

from?"), asked shortly after directing defendant to exit the car and stand near the driver, unnecessarily prolonged the detention of defendant. This situation is, therefore, entirely distinguishable from the impermissibly prolonged detention at issue in *People v. Brownlee*, 186 Ill. 2d 501, 519-20 (1999), in which the officers, after determining that no traffic citation would be issued, nevertheless kept the occupants of the car from departing until they agreed to permit the car to be searched.

Thus, the determinative issue is whether these two simple questions altered the fundamental nature of the stop. The special concurrence in *Gonzalez* pointed out that the majority had not explained "what type of questioning would change the fundamental nature of the stop." *Gonzalez*, 204 Ill. 2d at 242 (Thomas, J., specially concurring, joined by Garman, J.). The present case requires us to consider this question.

Almost a year before this court decided *Gonzalez* and adopted the two-pronged duration-and-scope inquiry, the appellate court considered the question of the permissible scope of questioning during a traffic stop in *People v. White*, 331 Ill. App. 3d 22 (2002). The defendant was the driver of a car that was validly stopped by police, who then inquired about items they saw in the backseat of the car, even going so far as to ask to see sales receipts. The receipts produced by the defendant contained a different name from his and led to the discovery that the items had been obtained illegally. The defendant was charged with forgery and theft by deception. *White*, 331 Ill. App. 3d at 24. The defendant argued that the officer violated his fourth amendment rights by questioning him about matters unrelated to the purpose of the traffic stop. *White*, 331 Ill. App. 3d at 25. The State argued that an officer is not prohibited from making inquiries unrelated to the purpose of the stop, so long as the stop itself and the length of the detention were otherwise lawful. *White*, 331 Ill. App. 3d at 24.

The appellate court relied on many of the same cases that were cited by the *Gonzalez* majority when it concluded:

> "While a police officer making a lawful stop of a motorist is not precluded from making reasonable inquiries concerning the purpose of the stop, the scope of the activities and questioning by the police during an investigatory detention must be reasonably related to the circumstances that initially justified the stop. [Citation.] An officer may expand the scope of his detention beyond that which is reasonably related to the circumstances only when the officer has a reasonable and articulable suspicion that other criminal activity may be afoot or where matters that arise during the course of the stop cause the officer reasonable suspicion. [Citation.] Questioning wholly unrelated to the purposes of the stop, which is *reasonably calculated to elicit incriminating responses*, is impermissible unless supported by independent, reasonable, and articulable suspicion." (Emphasis added.) *White*, 331 Ill. App. 3d at 34.

The *White* court concluded that "the officer's questions regarding the ownership of the items in the car were intrusive and calculated to elicit possibly incriminating responses." *White*, 331 Ill. App. 3d at 34-35. The appellate court affirmed the trial court's suppression order. *White*, 331 Ill. App. 3d at 35.

In my opinion, *White* provides a useful framework for application of the scope prong of the *Gonzalez* inquiry. If the questions posed by the officer are unrelated to the purpose of the stop, then they are improper if they are reasonably calculated to elicit an incriminating response. Thus, if the basis of the stop is a broken headlight, a question about what is in a duffle bag in the backseat would be improper in the absence of independent, reasonable, and articulable suspicion.

Not all questions fall into these two categories, however. A question may be unrelated to the purpose of the stop, but not likely to elicit an incriminating response. The questions posed by the officer in the present case ("What's your name? Where [are] you coming from?") are of this variety. The answers to these questions had nothing to do with the initial purpose of the stop, which was to investigate a suspected inoperative brake light, yet they were not likely to elicit incriminating information. Indeed, it was not defendant's answers that incriminated him. It was the fact that, as he spoke, he revealed the packet of drugs that he was trying to conceal in his mouth.

In sum, I conclude that defendant was lawfully seized when the car in which he was riding was stopped for investigation of a possible traffic violation. Even though the driver was placed under arrest and the officer intended to impound the car, the lawful seizure of defendant was still in effect when the officer told him where to stand and asked him two questions while shining a flashlight in his face. Therefore, the questions did not impermissibly prolong the duration of his detention. The questions themselves were permissible because they did not change the fundamental nature of the stop by seeking to elicit incriminating information unrelated to the purpose of the stop. I would reverse the appellate court and affirm the trial court's denial of defendant's motion to quash arrest and suppress evidence.

JUSTICE THOMAS, dissenting:

I disagree with the majority's conclusion that the officer's questioning of defendant, after defendant exited the vehicle, violated defendant's fourth amendment rights. In reaching its conclusion, the majority contradicts a wealth of well-settled fourth amendment law and unduly extends *People v. Gonzalez*, 204 Ill. 2d 220 (2003), and *People v. Brownlee*, 186 Ill. 2d 501 (1999), to apply to the present

case, which is factually inapposite. Accordingly, I respectfully dissent.

The United States Supreme Court has repeatedly held that "mere police questioning does not constitute a seizure" for purposes of determining whether a fourth amendment violation has occurred. *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398, 111 S. Ct. 2382, 2386 (1991). Thus, "[p]olice may approach persons and ask questions or seek their permission to search, provided that the officers do not imply that answers or consent are obligatory." *United States v. Childs*, 277 F.3d 947, 950 (7th Cir. 2002), citing *Florida v. Rodriguez*, 469 U.S. 1, 5-6, 83 L. Ed. 2d 165, 170-71, 105 S. Ct. 308, 311 (1984); *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210, 216, 80 L. Ed. 2d 247, 255, 104 S. Ct. 1758, 1762 (1984); *Florida v. Royer*, 460 U.S. 491, 501, 75 L. Ed. 2d 229, 238-39, 103 S. Ct. 1319, 1326 (1983) (plurality op.); *United States v. Mendenhall*, 446 U.S. 544, 552-58, 64 L. Ed. 2d 497, 508-12, 100 S. Ct. 1870, 1876-79 (1980). Instead, a seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n.16, 88 S. Ct. 1868, 1879 n.16 (1968).

The usual test for determining whether a fourth amendment violation has occurred is whether "'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.' " *Michigan v. Chesternut*, 486 U.S. 567, 573, 100 L. Ed. 2d 565, 572, 108 S. Ct. 1975, 1979 (1988), quoting *Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509, 100 S. Ct. at 1877. This test applies where police encounter a person walking down a street or through an airport (*Bostick*, 501 U.S. at 435, 115 L. Ed. 2d at 399, 111 S. Ct. at 2387), and obviously applies to a driver at a traffic stop, who is not free to leave until police have finished processing the stop

(*Gonzalez*, 204 Ill. 2d at 238 (Thomas, J., specially concurring)). Examples of circumstances that might indicate a seizure under the "free to leave" test include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509, 100 S. Ct. at 1877.

A different test applies, however, when the person's freedom of movement is restricted by circumstances independent of police conduct, such as when a person is on a bus or at work, and therefore has no desire to leave. *Bostick*, 501 U.S. at 435-36, 115 L. Ed. 2d at 399, 111 S. Ct. at 2387 (when a person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he is free to leave is not an accurate measure of the coercive effect of the encounter); *Delgado*, 466 U.S. at 218, 80 L. Ed. 2d at 256, 104 S. Ct. at 1763 (when people are at work their freedom of movement has been meaningfully restricted by their voluntary obligations to their employers). In such situations, the appropriate test is not whether the person was "free to leave." Rather, the relevant question is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. *Bostick*, 501 U.S. at 436, 115 L. Ed. 2d at 400, 111 S. Ct. at 2387.

I believe that the approach applied in *Bostick* is the correct one to be applied here. Defendant's freedom to leave was hampered not because of police conduct investigating him for a violation of the vehicle code, but because he was a passenger in a car driven by a defendant who was lawfully arrested. I would further find, however, that there was no fourth amendment violation under either analysis.

Turning to the *Bostick* test first, I note that defendant was a passenger in a stopped car and not a suspect. He then exited the vehicle he was sitting in when it became clear that the driver and owner of the vehicle had been arrested and that the vehicle was to be towed and impounded. At that point, defendant was a pedestrian, but without any immediate desire to leave because he was being left stranded along the roadway late at night. At this point, the officer posed the two innocuous questions at issue: "What's your name? Where you [*sic*] coming from?" Defendant's response to these questions shows, without a doubt, that he believed he was free to decline the officer's request. Defendant answered the first question, but ignored the second. Instead, defendant asked a question of his own, engaging the officer in conversation about why the driver was being arrested.

Instead of applying a *Bostick* analysis, the majority applies the "general framework" of *Gonzalez*, which adopted the test set forth in a partial concurrence and partial dissent to a Tenth Circuit opinion that involved questioning of a *driver*. See *United States v. Holt*, 264 F.3d 1215, 1239-40 (10th Cir. 2001) (Murphy, J., concurring in part and dissenting in part). This test looks first to whether the question was related to the initial purpose for the stop or whether there was a reasonable suspicion of criminal activity. If the questioning is not related to the initial purpose of the stop and there is no suspicion or criminal activity, the next inquiry is whether the question prolonged the duration of the stop or changed the fundamental nature of the stop.

In *Gonzalez*, the defendant was a passenger in a vehicle stopped by two police officers for not having a front licence plate. One of the officers asked the defendant for his identification during the course of the stop. The officer ran a computer check on the traffic ticket that the defendant

handed to the officer, and the ensuing encounter led to a search of the defendant's person, revealing a packet of cocaine. This court found that the detention did not violate fourth amendment principles. *Gonzalez*, 204 Ill. 2d at 236.

In my special concurrence in *Gonzalez*, I noted that *Bostick* provided the proper analysis for determining whether the passenger had been seized for fourth amendment purposes when the officer asked for his identification. This was because the passenger was not suspected of any wrongdoing, and his freedom of movement was not restricted given that police were not investigating him for violating the vehicle code, but rather he was a passenger in a car that had not yet reached its destination. I pointed out that the majority had erroneously assumed that the initial "seizure" by police thereafter subjected both driver and passenger to a fourth amendment seizure for the entire duration of the stop. I further noted that the majority had erroneously held that the questioning of the passenger must be viewed as part of the investigation of the driver. I then noted that, in the end, it appeared that the majority actually applied *Bostick* rather than the *Holt* partial dissent and partial concurrence to reach its result.

In the present case, the majority goes much further down the wrong road than it did in *Gonzalez*. Even applying the *Gonzalez* framework lifted from the partial concurrence and partial dissent of *Holt*, it is clear that the questioning of defendant did not violate the fourth amendment. The majority begins by finding that the facially innocuous questions in the present case were not related to the purpose of the stop. The majority is mistaken on this point for several reasons. Initially, I note that the majority's conclusion appears to be the result of its faulty characterization of the purpose of the stop, *i.e.*, to investigate "operating a vehicle without brake lights." See slip op. at 7. In limiting the purpose of the stop in this way, the majority

ignores that, unlike in *Gonzalez*, the purpose of the stop in the present case changed once the driver failed to produce a license and was arrested. At that point, the purpose of the stop broadened to encompass the encounter with the stranded passenger.

The trial court properly concluded that the officer had numerous reasons to have a conversation with defendant, "including explaining to him the reasons for the arrest [and] *to determine *** who he is so that perhaps he can be an alternate driver.*" (Emphasis added.) See *Mendenhall*, 446 U.S. at 554 n.6, 64 L. Ed. 2d at 509 n.6, 100 S. Ct. at 1877 n.6 (the subjective intentions of an officer are irrelevant to a fourth amendment analysis, except to the extent that they have been communicated to the defendant); see also *Ohio v. Robinette*, 519 U.S. 33, 38, 136 L. Ed. 2d 347, 354, 117 S. Ct. 417, 420-21 (1996) ("' "the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action" ' "), quoting *Whren v. United States*, 517 U.S. 806, 813, 135 L. Ed. 2d 89, 98, 116 S. Ct. 1769, 1774 (1996), quoting *Scott v. United States*, 436 U.S. 128, 138, 56 L. Ed. 2d 168, 178, 98 S. Ct. 1717, 1723 (1978).

Despite the trial court's undeniably objective rationale for the questioning, the majority inexplicably concludes that the questions the officer posed were not related to any of the reasons offered by the trial court. I fail to understand the majority's belief that the query "What's your name?" is not related to the reason given for the query by the trial court, namely, to find out the identity of the passenger to decide if he could be an alternate driver. I would find that the officer's questions about defendant's identity and where he had come from were clearly related to the trial court's stated reason of determining "who he is so that perhaps he

can be an alternate driver." Obviously, if someone is to drive a vehicle away from the scene where the owner has been arrested, the officer would be responsible for determining if that person is legally able to drive. The questions were also reasonably related to the purpose of the stop based on an objective concern any officer would have for a passenger who might be left stranded as a result of the driver's arrest. Additionally, the innocuous questions here could easily be viewed as nothing more than a polite prelude, leading to an explanation for the arrest of the driver. For these reasons, I would find that the questions were related to the purpose of the stop. The stop was therefore proper under *Gonzalez*.

Next, the majority simply concludes that because the questioning occurred after the purpose of the stop terminated, it must have prolonged defendant's detention beyond the purpose of the stop. It is at this point that the majority's analysis seriously falters. The majority's summary conclusion begs the real issue in this case—whether the initial seizure at the time of the stop had dissipated into a nonseizure, involving a *Bostick*-like encounter. Because the stop in this particular case ended *vis-a-vis* defendant by the time defendant stepped out of the vehicle with the driver under arrest, there is no need to continue with a *Gonzalez* analysis under the circumstances presented here. Instead, the proper test to be applied is *Bostick*. Defendant was no longer a passenger subject to a traffic stop when he stepped out of the vehicle. That the officer, out of courtesy, may have wanted to explain the reason for the arrest or that he may have been concerned for the passenger as he attempted to arrange his way home does not mean that the encounter continued to be a nonconsensual seizure. Defendant was not asked to exit the vehicle to continue the "purpose" of the stop or, as a matter of course, out of concern for officer safety. *Cf. People v. Sorenson*, 196 Ill. 2d 425, 433 (2001) (as a matter of course, police may order a

passenger out of a vehicle pending completion of a stop, and if police believe he is armed and dangerous, they may conduct a pat-down search of his person too). Rather, defendant was asked out of the car because he would no longer be traveling in it that night, as the driver had been arrested and the vehicle was to be towed and impounded.

Perhaps in recognition of the futility of applying the *Holt-Gonzalez* framework to the facts of the present case, the majority ultimately attempts to dig itself out of its predicament by shoveling forth *People v. Brownlee*, 186 Ill. 2d 501 (1999). However, *Brownlee* is completely distinguishable and should have no application here to support the majority's position. Actually, *Brownlee* helps illustrate why defendant's encounter with police, after he exited the vehicle, was consensual.

First, *Brownlee* decided whether a driver was seized, not a passenger. Unlike the present case, the driver in *Brownlee* produced a valid license, which was returned to him after it was checked. The officers decided not to issue a citation. Thus, the valid portion of the stop in *Brownlee* ended without arrest, and there was no reason to ask any of the occupants to step out of the vehicle. Nevertheless, two officers continued to flank the vehicle for a couple of minutes, before finally asking the driver for consent to search. In contrast, the driver in the present case was lawfully handcuffed and arrested, and the vehicle was impounded. The lone officer here then lawfully directed the passenger out of the vehicle for the purpose of taking control it. At that point, defendant was a pedestrian with no immediate desire to leave the scene and, therefore, a *Bostick* analysis should apply.

Second, *Brownlee* appropriately applied the "free to leave" test to the case before it, citing *Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509, 100 S. Ct. at 1877, because there was no outside force, aside from the police conduct, confin-

ing the driver to the location once he was handed back his license. But even applying the *Mendenhall* free-to-leave test to the facts in the case at bar, I would conclude that there was no fourth amendment violation. *Mendenhall*'s criteria for examining whether a seizure has occurred overwhelming supports the State's position: defendant was approached by a single officer, not multiple officers flanking the vehicle as in *Brownlee*; the officer did not display a weapon; he did not physically touch defendant; and he did not use language or tone of voice to show that compliance with his request might be compelled. Despite a complete absence of these indicators, the majority concludes that the officer's use of a flashlight indicated a show of authority. However, I do not find the officer's use of a flashlight late at night to be indicative of a show of authority in the absence of any of the other examples that are normally looked at to make this determination. Moreover, I am not aware of any case law holding that a show of authority results from the mere use of a flashlight by an officer late at night to see the person with whom he is speaking. Furthermore, I note that the trial court correctly concluded that directing defendant to exit toward the rear of the car had no legal significance. An officer may question a person without bringing about a seizure not only when the questioning does not interrupt a person's movement, but also where the officer overtakes the pedestrian and asks him to halt or where the officer summons him to where the officer is located. 4 W. LaFave, Search & Seizure §9.3(a), at 98 (3d ed. 1996).

In conclusion, I disagree that defendant's fourth amendment rights were violated. Applying the *Bostick* test, I would find that the encounter between the officer and defendant outside the vehicle was consensual and that a reasonable person in defendant's position would have believed he was free to ignore the officer's questions or otherwise terminate the encounter. The *Gonzalez* framework is unworkable as applied to this kind of fact pattern,

and *Brownlee* is clearly distinguishable. Accordingly, I dissent from the majority opinion.

Appendix B

THIRD DIVISION
February 13, 2002

No. 1-00-3245

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	
BERNARD BUNCH,	)	Honorable John J. Moran, Jr., Judge Presiding.
Defendant-Appellant.	)	

JUSTICE WOLFSON delivered the opinion of the court:

Following a bench trial, defendant Bernard Bunch was convicted of possession of a controlled substance and sentenced to four years in prison. Defendant's motion to quash his arrest and suppress evidence, heard simultaneously with his trial, was denied. On appeal, defendant contends that the trial court erred in denying the motion to suppress. We reverse.

FACTS

Officer Daniel Lukensmeyer testified that at approximately 1:10 a.m. on February 2, 2000, he was on patrol alone in a marked police vehicle when he observed a 1990 Pontiac automobile near 35th Street and Wentworth Avenue in Chicago. He saw the driver of that vehicle slow

down and come to a stop but did not see the vehicle's brake lights activate when they should have. The officer initiated a traffic stop by following the vehicle and flashing his emergency lights. As he projected his high-beam headlights into the vehicle, he saw the driver lean forward twice toward the dashboard. When the vehicle stopped, the officer approached the driver, defendant's brother, and subsequently arrested him for driving without a license. At some point during the arrest, the driver informed the officer that he owned the vehicle.

The officer, after handcuffing the driver, walked to the passenger side and instructed the defendant to get out of the car and wait at the rear while he took charge of the vehicle.

Standing about one foot apart, the officer and defendant engaged in a conversation in which the officer asked defendant some questions, including his name and where he was coming from. The officer testified he was "curious to find out exactly who he was." Defendant then asked why the driver was arrested. As they spoke, the officer shined his flashlight on defendant's face, as he normally did when working at night. A few seconds into the conversation, the officer saw a small clear plastic object containing white material inside defendant's mouth, and then saw it a second time. Based on his 35 years' experience as a police officer and more than 2,000 narcotics arrests, the officer suspected that the object was a bag containing heroin or cocaine.

The officer arrested defendant and ordered him to expectorate the object; defendant complied. The object was a plastic bag containing white material later confirmed to be heroin. After calling for assistance, the officer investigated the interior of the vehicle and retrieved two plastic bags containing white powder from a void in the dashboard. The officer testified that defendant then made an unsolic-

ited statement that "[a]ll the heroin you found is mine." When assistance arrived, the officer tested the brake lights of the vehicle and discovered that they were working properly.

Defendant was later charged by information with possession of less than 15 grams of a controlled substance based on the plastic bag of heroin found in his mouth.

After hearing the officer's testimony and defendant's argument on his motion to quash arrest and suppress evidence, the court denied the motion and defendant's trial continued.

Defendant testified to a different version of events. He said the officer did not mention or examine the vehicle's brake lights, but told defendant's brother that he stopped them "because [he] saw two black men in the car." After the driver was arrested, the officer told defendant to exit the vehicle, handcuffed him and placed him inside the police car, saying the handcuffs were for the officer's personal safety. Defendant testified that he did not have anything in his mouth and did not spit anything out. The officer then removed a black case from the trunk of the police car and carried it into the vehicle that defendant had exited. Defendant testified that he never told the officer that the narcotics in the vehicle were his, and that he had no narcotics on that date.

DECISION

Defendant contends the officer had no legal justification for stopping and questioning him, and no probable cause for his arrest.

When, as here, a defendant challenges neither the trial court's findings of fact nor its determination of witness credibility, a ruling on a motion to suppress is reviewed *de*

novo. *People v. Mendez*, 322 Ill. App. 3d 103, 109, 749 N.E.2d 391 (2001). In presenting a motion to suppress, the defendant bears the burden of establishing that the search or seizure was unreasonable or unlawful. *People v. Juarbe*, 318 Ill. App. 3d 1040, 1049, 743 N.E.2d 607 (2001).

Initially, the State argues that defendant lacks standing to challenge the stop because he did not own or have a possessory interest in the vehicle. The State concedes that defendant had a subjective expectation of privacy while in the vehicle, but contends that his expectation is not controlling, pursuant to *People v. Johnson*, 114 Ill. 2d 170, 192, 499 N.E.2d 1355 (1986).

We disagree. We find defendant's liberty was infringed when he was an occupant of a vehicle stopped by the police and therefore he has standing to challenge the stop. *People v. Fullwiley*, 304 Ill. App. 3d 44, 49, 710 N.E.2d 491 (1999); see also *People v. Kunath*, 99 Ill. App. 3d 201, 205, 425 N.E.2d 486 (1981).

Defendant contends the stop was illegal because the officer was mistaken about the vehicle's brake lights not working. Generally, a short investigatory stop for a minor traffic violation is considered an exception to the warrant requirement under *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906, 88 S. Ct. 1868, 1880 (1968). *Juarbe*, 318 Ill. App. 3d at 1049.

To comport with the requirements of the fourth amendment, *Terry* stops are permissible only if there is "a reasonable suspicion based on specific and articulable facts that the person has committed, or is about to commit, a crime." *People v. Brownlee*, 186 Ill. 2d 501, 518, 713 N.E.2d 556 (1999). A *Terry* stop is reasonable only if it was (1) justified at its inception and (2) reasonably related in scope to the circumstances that justified the detention in the first place. *Brownlee*, 186 Ill. 2d at 518-19.

An officer has a right and a duty to stop an automobile without brake lights. *People v. Cannon*, 18 Ill. App. 3d 781, 785, 310 N.E.2d 673 (1974). See 625 ILCS 5/12-208(a) (West 2000) (every vehicle shall have a red or amber stop lamp which shall be actuated upon application of the foot brake). When an officer is mistaken about what he has observed, the test is not what the officer should have seen but whether a reasonable and prudent person would believe that a crime had been committed when objectively viewing the facts and circumstances known to the officer at the time. *People v. Assenato*, 186 Ill. App. 3d 331, 337, 542 N.E.2d 457 (1989) (stop based on an officer's mistaken belief that vehicle lacked valid license plate was proper); see *People v. Bradi*, 107 Ill. App. 3d 594, 437 N.E.2d 1285 (1982) (evidence was admissible where stop was based on the officer's mistaken belief and the officer later saw the passenger throw a bag containing a white powdery substance on the ground.)

Here, the judge apparently believed Officer Lukensmeyer had observed a traffic violation, although the officer's testimony about his reason for stopping the car is vague at best. We note the State does not seek to justify the stop of the car in its brief on appeal, apparently because of its mistaken impression that the defendant cannot challenge the stop of the car. See *Kunath*, 99 Ill. App. 3d at 205-06. Reluctantly, we accept the trial judge's conclusion.

Events that took place after the stop of the car persuade us the arrest of the defendant violated the Fourth Amendment.

The defendant was a passenger. While in the car he did and said nothing that would create the suspicion he was engaging in criminal activity or was a threat to the officer. The driver of the car had been secured and handcuffed. It was then that the officer ordered the defendant out of the car and instructed him to walk to the rear of it.

Lukensmeyer then began asking the defendant questions because he was "curious to find out who he was." It was after those questions were asked that the defendant asked his own question, in the process opening his mouth and exposing the plastic bag. The arrest and order to spit out followed.

These events are strikingly similar to those in *People v. Gonzalez*, 324 Ill. App. 3d 15, 753 N.E.2d 1209 (2001). There, as here, the initial traffic stop was assumed to be valid. While sitting in the car the defendant, a passenger, was asked to identify himself. After he did so, and after the officer learned the defendant was a gang member, the defendant was ordered out of the car and taken to the rear of it. According to the officer, the defendant then gave permission to be searched. Cocaine was found.

The court held the officer did not have a lawful basis to ask the defendant for identification. The reason applies equally here: ". . . because Officer McCarthy did not suspect defendant of any criminal activity." *Gonzalez*, 324 Ill. App. 3d at 18. The court held everything that flowed from the unlawful detention was tainted and ought to be suppressed.

The point made in *Gonzalez*—that a police officer has to have some lawful authority to ask a defendant for identification—also was made in *People v. Branch*, 295 Ill. App. 3d 110, 692 N.E.2d 398 (1998).

In this case, the officer did more than ask for identification. He ordered the defendant out of the car and to the rear of it because he was "curious." The defendant submitted. We believe the defendant was detained at that point without lawful authority. Curiosity is not a good reason to detain. Everything that flowed directly from that unlawful detention must be suppressed. See *Brownlee*, 186 Ill. 2d at 518-19.

There is another reason to sustain the defendant's motion to suppress. When Lukensmeyer saw the plastic bag in the

defendant's mouth he arrested the defendant. It was not a *Terry* search. It was a probable cause arrest. The officer testified he made the arrest because "I had my suspicions that it was heroin or cocaine, one or the other." Suspicions, no matter how reasonable, do not add up to probable cause to arrest. See *Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed.2d 301, 309, 110 S.Ct. 2412, 2416 (1990). See also *People v. Kidd*, 175 Ill. 2d 1, 22, 675 N.E.2d 910 (1996) (Mere suspicion is not adequate to establish probable cause.).

CONCLUSION

Based on our *de novo* review, we reverse the trial court's order denying the defendant's motion to suppress. Since the heroin that was in the defendant's mouth was the only evidence against him there is no reason to remand this cause.

Reversed.

HALL, P.J., and SOUTH, J., concur.

Supreme Court, U.S.
FILED
FEB 25 2004
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(2)

No. 03-774

In the Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

BERNARD BUNCH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. After arresting the driver of a lawfully stopped vehicle and deciding to tow that vehicle, thus concluding the purpose of the stop, whether a police officer can then interrogate the passenger of that vehicle about matters unrelated to the purpose of the traffic stop merely because the officer was "curious."

2. Whether probable cause exists to arrest an individual where the officer approached the individual and engaged him in conversation without having any basis to suspect he was involved in the use or possession of narcotics and then during that conversation the officer observes a white packet in that person's mouth that the officer suspected contained "either heroin or cocaine."

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RESPONDENT'S BRIEF IN OPPOSITION TO THE STATE OF ILLINOIS' PETITION FOR A WRIT OF CERTIORARI

Respondent, Bernard Bunch, respectfully asks this Court to deny the State of Illinois' request for this Court to issue a writ of certiorari to the Supreme Court of Illinois to review that court's judgment and order entered on August 21, 2003.

OPINIONS BELOW

Petitioner's recitation of the opinions below is complete and correct.

JURISDICTION

Petitioner's jurisdictional statement is complete and correct.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's recitation of the applicable Constitutional provisions involved is complete and correct.

STATEMENT OF THE CASE

Respondent's motion to quash arrest and suppress evidence proceeded simultaneously with his trial. Officer Lukensmeyer testified that at 1:10 a.m. on February 1, 2000, he was working alone in a marked police vehicle in the area of Thirty-Fifth Street and Wentworth Avenue in Chicago. He observed a 1990 Pontiac, which was proceeding westbound on Thirty-Fifth Street, slow down and come to a brief stop. Lukensmeyer did not see the vehicle's brake lights activate. As the Pontiac continued on its way,

Lukensmeyer shined his MARS lights, take-down lights, and his bright headlights into the rear of the car. Lukensmeyer testified that he saw the driver lean forward twice toward the dashboard before the driver pulled the vehicle over and stopped. Respondent, a passenger in the front seat of the vehicle, was the only other person in the vehicle. Lukensmeyer approached the vehicle on the driver's side and commanded both the driver and the Respondent: "Don't move!" Lukensmeyer then asked the driver for his license. When the driver could not provide a license, Lukensmeyer asked him to step out of the vehicle and placed him under arrest. He handcuffed the driver and walked him to the rear of the car.

According to Lukensmeyer, he then walked around to the passenger side of the vehicle and asked Respondent to exit the car and step to the rear of the vehicle, where the driver was standing. Lukensmeyer testified that he asked Respondent out of the car so that he could "take charge" of the vehicle, i.e. because the driver was arrested Lukensmeyer was going to have the car transported to the station where it would be towed to an impound lot. At some point during the traffic stop, Lukensmeyer learned the driver was the owner of the vehicle, but he could not recall whether this occurred before or after he asked Respondent to exit the car.

Lukensmeyer testified that after Respondent exited the vehicle, he asked him, "What's your name? Where you [sic] coming from?" When questioned on cross-examination as to why he asked Respondent these questions, Lukensmeyer responded, "I'm a policeman [.] I want[ed] to know who he was and I was curious to find out exactly who he was. That's all." Respondent provided his name and additionally asked Lukensmeyer why the driver was being arrested. Lukensmeyer answered Respondent's question. During this conversation, in which the two men were about one foot apart, Lukensmeyer twice shined his

flashlight in Respondent's face. Lukensmeyer explained that when he is working nights, he shines his flashlight in everyone's face because there is a "strong possibility they may have something in their mouths." Lukensmeyer denied that he questioned Respondent merely to see if there was anything in his mouth.

Both times Lukensmeyer shined his flashlight in Respondent's face, he observed a small, clear plastic item, containing something white, in Respondent's mouth. Lukensmeyer testified: "I had my suspicions that it was either heroin or cocaine, one or the other." Lukensmeyer informed Respondent he was under arrest. He then ordered Respondent to spit the object out of his mouth, which he did. Lukensmeyer recovered one plastic bag containing a white powder, which later tested positive for the presence of heroin. Lukensmeyer handcuffed Respondent and called for assistance. During his search of the Pontiac, Lukensmeyer recovered two similar plastic bags, also containing what he believed to be heroin, from a space in the dashboard. At this point, according to Lukensmeyer, Respondent made an unsolicited statement that "all the heroin you found is mine."

According to Lukensmeyer, after he arrested the driver and Respondent, he then tested the vehicle and discovered the brake lights were, in fact, working properly. The parties stipulated to the chain of custody and that the white powder tested positive for the presence of heroin. In connection with his motion to quash arrest and suppress evidence, Respondent argued that the officer did not have legal justification to ask him to exit the vehicle, to step to the rear of the vehicle, or to interrogate him. The State maintained that moving Respondent to the rear of the vehicle was minimally intrusive and that no interrogation took place. Rather, Respondent engaged the officer in conversation.

The trial court denied Respondent's motion. In its oral ruling, the trial court indicated it found the officer's testimony credible. The trial court concluded there was nothing impermissible in asking Respondent his name and that moving Respondent to the rear of the car had no legal significance. The trial court further speculated the officer had numerous reasons to have a conversation with Respondent, including explaining to him the reason for the arrest and determining if Respondent could be an alternative driver. According to the trial court, shining the flashlight in Respondent's face merely allowed the officer to assess Respondent in poor lighting conditions. Finally, the trial court found that the officer had probable cause to arrest Respondent, based on his observation of the object in his mouth.

Following the trial court's denial of Respondent's motion, the bench trial continued with Respondent's testimony. Respondent offered a different version of events. Respondent testified that when the driver of the vehicle, his brother, asked Officer Lukensmeyer why he stopped them, the officer replied, "Because I saw two black men in the car." The officer made no mention of the Pontiac's brake lights and never examined them. According to Respondent, after arresting and handcuffing his brother, Officer Lukensmeyer then placed his brother in the police vehicle. He then approached Respondent and asked him to get out of the vehicle. Once outside the vehicle, Lukensmeyer told Respondent to turn around and then placed handcuffs on him, saying that it was for the officer's own safety. As Lukensmeyer spoke to him, the officer shined a flashlight in his face. Respondent testified that he did not have anything in his mouth, and that the officer never asked him to spit out anything. After placing Respondent in the police car, Lukensmeyer removed a black case from the trunk and returned to the police car and told Respondent and his brother that he

found drugs inside their car. Respondent denied having narcotics in his possession and denied telling Lukensmeyer that any drugs in the car belonged to him.

The trial court found Respondent guilty of possession of a controlled substance and subsequently sentenced him to a four-year term of imprisonment. The appellate court reversed, concluding the arrest of Respondent violated the fourth amendment to the United States Constitution (U.S. Const. amend. IV). 327 Ill.App.3d at 983-84. The appellate court stated, in relevant part:

> A police officer has to have some lawful authority to ask a defendant for identification * * *.
>
> In this case, the officer did more than ask for identification. He ordered the defendant out of the car and to the rear of it because he was 'curious.' The defendant submitted. We believe the defendant was detained at that point without lawful authority. Curiosity is not a good reason to detain. Everything that flowed directly from the unlawful detention must be suppressed. 327 Ill.App.3d at 983.

The appellate court also concluded there was an additional reason to grant the Respondent's motion. The court noted the officer made his arrest because, "I had my suspicions [the object in Respondent's mouth] was heroin or cocaine, one or the other." 764 N.E.2d 1189, 1193. The court noted, "Suspicions, no matter how reasonable, do not add up to probable cause to arrest." 764 N.E.2d at 1194; citing *Alabama v. White*, 496 U.S. 325 (1990). The Illinois Supreme Court affirmed. Citing to its earlier decision in *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003), the Illinois Supreme Court analyzed the issue using the scope and duration analysis used by this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Florida v. Royer*,

460 U.S. 491 (1983) (plurality opinion). The Illinois Supreme Court framed the issue as follows:

> We must consider, as an initial matter, whether a question is related to the initial justification for the stop. If the question is reasonably related to the purpose of the stop, no fourth amendment violation occurs. If the question is not related to the purpose of the stop, we must consider whether the law enforcement officer had a reasonable, articuable suspicion that would justify the question. If the question is so justified, no fourth amendment violation occurs. In the absence of a reasonable connection to the purpose of the stop or a reasonable, articuable suspicion, we must consider whether, in light of all the circumstances and common sense, the question impermissibly prolonged the detention or changed the fundamental nature of the stop. 796 N.E.2d at 1030.

The Court found the officer's questions ("What's your name?" and "Where you [sic] coming from?") were not related to the purpose of the stop, i.e. operating a vehicle without break lights, and the questions were not supported by a reasonable, articuable suspicion of criminal conduct. 796 N.E.2d at 1030-31.

The Court next found these questions impermissibly prolonged the Respondent's detention. 796 N.E.2d at 1032. The Court found the questioning impermissibly prolonged the detention because the driver had already been placed under arrest, and the officer had decided to have the car towed and the defendant was directed out of the vehicle for that purpose, yet the Respondent's detention continued. *Id.* Finally, the Court rejected the State's contention that, even if the purpose of the stop had been completed when the officer ordered the defendant out of the vehicle, the questioning was nonetheless permis-

sible because the ensuing conversation was purely consensual. 796 N.E.2d at 1031-32. Specifically, the Court held:

> The officer directed defendant to move to the rear of the vehicle, where the driver—who was already under arrest and handcuffed—was standing. Then, positioning himself just a foot from the defendant and shining his flashlight in defendant's face, the officer asked him," "What's your name? Where you [sic] coming from? Given these circumstances, we conclude that the officer's actions constituted a show of authority such that a reasonable person would conclude that he or she was not free to leave. 796 N.E.2d at 1032.

Even though the appellate court found there was no probable cause for the Respondent's arrest, the Illinois Supreme Court declined to address this issue. Subsequently, the State filed the instant Petition for Writ of Certiorari to this Honorable Court.

REASONS FOR DENYING THE WRIT

I. THE ILLINOIS SUPREME COURT'S DECISION HOLDING AN OFFICER'S INTERROGATION OF A PASSENGER IN AN ALREADY SEIZED VEHICLE MUST NOT EXCEED THE PROPER SCOPE AND DURATION OF THE PURPOSE OF THE TRAFFIC STOP WAS A SOUND APPLICATION OF FOURTH AMENDMENT PRINCIPLES.

The Illinois Supreme Court's decision that officers must have some reasonable basis to exceed the proper scope and duration of the purpose of the traffic stop was a sound application of Fourth Amendment principles. Petitioner, The State of Illinois (hereinafter referred to as "the State" or "The State"), argues this Court should

grant its Petition because there is "general confusion within the law at the present time" with regard to the propriety of interrogating passengers in an already seized vehicle when conducting routine traffic stops. The State's Petition for Writ of Certiorari (hereinafter referred to as "St. Pet.") 10. The State argues this Court has issued conflicting opinions in this regard. St. Pet. 9-10. On the one hand, this Court has held that "mere police questioning does not constitute a seizure" and thus, in general, questions from a police officer toward an individual not suspected of any crime are permissible under the Fourth Amendment, unless such questioning constitutes an impermissible show of authority that would convey the impression that compliance with the questioning was required. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). However, this Court has also held that a police officer must have reasonable suspicion to detain a person on the street to ask him for identification. *Brown v. Texas*, 443 U.S. 47 (1979).

There is no conflict between these cases and thus the Illinois Supreme Court, in applying its earlier issued opinion in *People v. Gonzalez*, 204 Ill.2d 220 (Ill. 2003), correctly recognized the difference between the two situations. The Court held that, once a passenger is already seized by virtue of the law-enforcement-induced traffic stop, then the issue of the propriety of the questioning of the passenger must be resolved by applying the framework this Court has used in addressing the proper scope and duration of a stop based pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968); 796 N.E.2d at 1030. (*See Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion), where a plurality of this Court held an investigative detention must be "temporary and last no longer than is necessary to effectuate the purpose of the stop" and it "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a

short period of time.") In its Petition, the State completely ignores *Royer*, a case that is essential to the outcome of this case because it sets up the basic scope-duration *Terry* analysis that has been employed by virtually every court that has addressed this issue. Thus, in this case, the Illinois Supreme Court correctly held the police officer exceeded the proper scope and duration of the *Terry* stop where, after having already arresting the driver for not having a valid driver's license, and after deciding to have the car towed, he asked the passenger, "Who are you?"; "Where [are] you coming from?".

The State attempts to cast doubt on the conclusion of the Illinois Supreme Court by arguing this Court implied in *Maryland v. Wilson*, 519 U.S. 408 (1997) that police officers do not need any justification for asking a passenger questions and requesting his identification. St. Pet. 11. However, this Court's decision allowing a per se rule that officers may order passengers out of a car during a traffic stop, without any articuable reason for doing so, was based on compelling reasons of officer safety. Here, no such argument had ever been made, either in the lower court proceedings or in the State's Petition, that a per sue rule allowing officers to inquire into a passenger's identity and his recent whereabouts is necessary based on some compelling reason such as officer safety. The State has waived the right to argue a compelling reason would justify the extension of *Wilson*'s per se rule to allow officers to continue to interrogate passengers about whatever matter they choose, regardless of reasonable suspicion or some other legal justification.

Moreover, to the extent that the State argues in its Petition that Officer Lukensmeyer's questions to the Respondent ("What's your name?" and "Where [are] you coming from?") were designed to determine whether he would be able to drive away the vehicle, the officer admitted that by the time he asked Respondent these

questions, he had already decided to have the vehicle towed, and that he asked these questions merely because he was "curious to find out exactly who he was. That's all." 796 N.E.2d at 1027. Although both the trial court and the State on appeal speculated that these questions could have been designed to determine whether Respondent was willing or able to drive the vehicle from the scene, The Illinois Supreme Court accepted Lukensmeyer's admission that he asked these questions to satisfy his own idle curiosity. 796 N.E.2d at 1030-31. To the extent the State tries to manipulate the record to ignore this admission, Respondent objects.

The State correctly indicates there is a split among the federal Circuits with regard to whether an officer needs to articulate a justification for interrogating the passenger of an already stopped vehicle. Yet, as applied to the facts *sub judice*, this split is essentially irrelevant to the resolution of the case. The State argues that the Fifth, Seventh, Eighth, Ninth and Tenth Circuits have issued various holdings on what constitutes the proper scope and duration of a routine traffic stop. St. Pet. 11-13; citing *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993); *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) (en banc), cert. denied, 537 U.S. 829 (2002); *United States v. Ramos*, 42 F.3d 1160 (8th Cir. 1994); *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001), cert. denied, 535 U.S. 948 (2002); and *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001) (en banc), cert. denied 535 U.S. 1019 (2002). The Fifth and Seventh Circuits have held the "scope" prong of the *Terry* stop only applies to seizures that unnecessarily prolong a detention, while the Eighth, Ninth and Tenth Circuits have held questioning must be justified in both scope and duration.

However, in this case the purpose of the stop concluded when the officer arrested the driver and decided to tow away the vehicle. Thus, even those Circuits that

have collapsed the scope and duration prong nevertheless agree there must be some reasonable basis for extending the *duration* of a traffic stop. *Shabazz*, 993 F.2d at 436; *Childs*, 277 F.3d at 952. In this case, the officer expanded the *scope and duration* of the stop merely because he was "curious" to find out the Respondent's identity. Thus, this case does not present this Court with the opportunity to address the actual split among the Circuits, i.e. whether the questioning *during* the course of the stop must be reasonably related to the purpose of that stop where such questioning does not unnecessarily prolong the duration of the stop. Accepting the State's Petition will not resolve this more contentious issue.

Similarly, save one, all of the state court cases cited in the State's Petition involved the questioning of passengers during the course of the stop, before its purpose had concluded. St. Pet. 14-15. *See State v. Griffith*, 613 N.W.2d 72 (Wisc. 2000) (questioning of the defendant, a passenger, occurred before the stop had been completed); *People v. Cartwright*, 85 Cal.Rptr.2d 788 (Cal. App. 1999) (same); *State v. O'Day*, 955 P.2d 860 (Wash. App. 1998) (same); *People v. Jackson*, 39 P.3d 1174 (Colo. 2002) (request for identification of the defendant, a passenger, occurred before the stop had been completed). The State only cites one case that involved a passenger, like Respondent, who was interrogated *after* the purpose of the stop had been completed. St. Pet. 15; *Graham v. Maryland*, 705 A.2d 82 (Md. App. 1998). Moreover, in *Graham* the court held the detention of the passenger after the trooper learned the driver did not have a valid driver's license was impermissible, concluding the trooper exceeded the scope and duration of that stop when he made the passenger wait for the arrival of a police canine unit. *Graham*, 705 A.2d at 93-94.

In sum, while the State is correct that there are a wide variety of appellate court opinions across the nation

with regard to the propriety of law-enforcement questioning directed toward passengers during routine traffic stops, this conflict will not be resolved by the case at bar because here the officer had already concluded the purpose of the traffic stop and the only reason he inquired into Respondent's name and recent whereabouts was because he was "curious."

Finally, contrary to the State's assertion, the Illinois Supreme Court did not place "special emphasis" on the fact that Officer Lukensmeyer shined a flashlight in Respondent's face when he was interrogating him about his identity and recent whereabouts. St. Pet. 15. Rather, the Illinois Supreme Court concluded the officer exceeded the proper scope and duration of the *Terry* stop, and thus the subsequent questioning of the defendant, which ultimately revealed the presence of narcotics secreted in his mouth, was the fruit of an illegal search and seizure. 796 N.E.2d at 1032-33. This Court should deny the State's Petition.

II. THIS COURT SHOULD ALSO DENY THE STATE'S PETITION BECAUSE THE OFFICER DID NOT HAVE PROBABLE CAUSE TO ARREST RESPONDENT BASED ON HIS MERE SUSPICION THE WHITE OBJECT IN RESPONDENT'S MOUTH WAS EITHER HEROIN OR COCAINE.

This Court should also deny the State's Petition because Respondent has a valid secondary reason for suppressing the evidence, i.e. there was no probable cause for his arrest. The Illinois appellate court reversed the trial court's decision denying Respondent's motion to quash arrest and suppress evidence for two reasons. First, while the court only "reluctantly" accepted the trial court's conclusion that the officer was justified in stopping the vehicle, it also ruled the officer exceeded the proper

scope and duration of the traffic stop when he interrogated the Respondent about his identity and recent whereabouts. 764 N.E.2d at 1193. However, the Illinois appellate court also ruled the evidence should be suppressed because the officer did not have probable cause to arrest the defendant for drug possession. *Id.* The officer even admitted that he had his "suspicions" that the object in the defendant's mouth was "either heroin or cocaine, one or the other." *Id.* The Court noted, "Suspicions, no matter how reasonable, do not add up to probable cause." 764 N.E.2d at 1193-94; citing *Alabama v. White*, 496 U.S. 325, 330 (1990).

Thus, this case is much different than *Texas v. Brown*, 460 U.S. 730 (1983), where this Court found an officer had probable cause to conclude a green balloon contained heroin. In *Brown*, while conducting a routine driver's licensing checkpoint, the officer noticed in plain view an opaque green balloon in the defendant's vehicle and he testified that, based on his experience in making drug arrests, narcotics were frequently packaged in balloons. *Brown*, 460 U.S. at 733-34. Moreover, the officer noticed that the interior of the glove compartment contained several small plastic vials, quantities of loose white powder, and an open bag of party balloons. *Brown*, 460 U.S. at 734. Here, unlike in *Brown*, Officer Lukensmeyer had no indication Respondent was involved in the illegal use or possession of narcotics and he admitted that when he saw a white object in Respondent's mouth he merely had his "suspicions" that it was "either cocaine or heroin."

Having ruled in Respondent's favor on the scope and duration issue, the Illinois Supreme Court declined to address Respondent's probable cause argument. If this Court were to accept the State's Petition, both parties would need to additionally brief the probable cause issue, and this Court, if it ruled against Respondent on

the scope and duration issue, would also have to address these arguments on a matter the State does not even contend is particularly noteworthy or contentious. This secondary issue further complicates the resolution of this case and is an additional reason to deny the State's Petition.

CONCLUSION

The State's petition for writ of certiorari should be denied.

Respectfully Submitted,

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In the Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

BERNARD BUNCH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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ARGUMENT

I. RESPONDENT HAS CONCEDED THAT THERE IS NATIONWIDE CONFUSION REGARDING WHETHER POLICE OFFICERS MAY QUESTION PASSENGERS OF LAWFULLY STOPPED VEHICLES.

The petition demonstrated that lower courts across the Nation are conflicted as to whether police officers may question automobile passengers when conducting routine traffic stops, and that the Illinois Supreme Court's splintered decision accurately mirrors the general confusion in the law. Pet. 10-15. Petitioner further demonstrated that the majority below erred in analyzing the issue under *Terry v. Ohio*, 392 U.S. 1 (1968), instead of *Florida v. Bostick*, 501 U.S. 429 (1991), and *United States v. Drayton*, 536 U.S. 194 (2002), since respondent's freedom of movement was restricted by circumstances other than police conduct directed toward him and because Officer Lukensmeyer did nothing to coerce his cooperation. Pet. 9-10. Finally, petitioner explained that the officer asking respondent for his name and travel history was reasonable and within the "community caretaking function" because the only other option would have been to leave respondent stranded at the side of the road in the middle of the night with no means of transportation. Pet. 16-17.

In his Brief in Opposition, respondent fails to directly contest any of these points. In fact, respondent specifically acknowledges that "there is a split among the federal Circuits with regard to whether an officer needs to articulate a justification for interrogating the passenger of an already stopped vehicle" (Opp. 10), and that "there are a wide variety of appellate court opinions across the nation with regard to the propriety of law-enforcement questioning directed toward passengers during routine traffic stops" Opp. 11-12. For this reason alone, the petition presents a compelling reason for granting certiorari, as police officers throughout the Nation

need to know when, and under what circumstances, they can question those passengers, ask for identification, and obtain other information.

Furthermore, rather than responding to the arguments presented in the petition, respondent contends that under *Florida v. Royer*, 460 U.S. 491 (1983), the Illinois Supreme Court properly held that his Fourth Amendment rights were violated because the questions Officer Lukensmeyer posed to him exceeded both the scope and extended the duration of the initial traffic stop. Opp. 8-9. Respondent's assertion completely ignores the fact that *Royer* is inapplicable to the present case since unlike Royer, who was properly stopped at an airport after the officers determined that he fit a "drug courier profile" but was improperly taken to a different location for further investigation, respondent here was never the subject of the police suspicion that triggered the traffic stop. See *Maryland v. Wilson*, 519 U.S. 408, 413-14 (1997) (recognizing that passengers of stopped vehicles are stopped as the result of circumstance as opposed to police action directed toward them).

Moreover, it is uncontested that Officer Lukensmeyer did not approach respondent or direct him to exit the vehicle until *after* the purpose of the traffic stop was completed and the driver was arrested. Thus, neither the scope of the stop nor its duration were affected in any manner when Officer Lukensmeyer asked respondent "[w]hat's your name. Where you [sic] coming from?" Also, because he was not being detained pursuant to police action, but was instead simply the victim of circumstances which left him stranded on the side of the road in the middle of the night, such questions were entirely permissible. See *Royer*, 460 U.S. at 497-98 (recognizing that mere police questioning, without more, is insufficient to implicate the Fourth Amendment).

Moreover, respondent mischaracterizes petitioner's reliance upon *Wilson*, and asserts that petitioner has waived any claim

that its holding should be extended to include inquiries into a passenger's identity or travel history in order to assure officer safety. Opp. 9. However, a simple reading of the petition reveals that no such claim was ever made. Rather, it is clear that the citation to *Wilson* was to demonstrate that the instant petition presents an issue which has never been resolved by this Court. Pet. 11 (citing *Wilson*, 519 U.S. at 414-15 n.3).[1]

Finally, respondent claims that petitioner "ignored" Officer Lukensmeyer's testimony that he questioned respondent because he was "curious to find out exactly who he was. That's all," and that therefore any assertion that the questions were intended to determine if respondent would be able to drive the car should be rejected. Opp. 9-10. However, respondent fails to recognize that the trial court judge who heard the testimony found that the officer "ha[d] numerous reasons to be conducting conversations with the [respondent,] including explaining to him the reasons for the arrest[,] to determine whether or not who he is [sic] so that perhaps he can be an alternate driver." The court also found that if respondent was to be an alternative driver, the officer was responsible for determining if that driver was: (1) impaired; (2) licensed to drive; and (3) able to drive. As this Court held in *Ornelas v. United States*, 517 U.S. 690, 699 (1996), "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Therefore, it is the findings of the trial court, which were made after considering the testimony as a whole, which control rather than isolated portions of that testimony.

More importantly, respondent's argument regarding Officer Lukensmeyer's motivation must be rejected, as it is premised upon his subjective intent rather than what was objectively

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[1] Of course, officer safety cannot be ignored when assessing the reasonableness of police conduct during traffic stops. See *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977).

reasonable. It is well-settled that the "touchstone" of Fourth Amendment analysis is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 108-109 (1977) (per curiam) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). Moreover, reasonableness must be viewed under an objective standard, rather than one based upon the subjective motivations of the police officer. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (stating that "we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"). Because it is entirely reasonable for police officers to pose questions to persons who are left stranded by the side of the road in the middle of the night after their traveling companion has been arrested, it is clear that respondent's Fourth Amendment rights were not infringed in this case. Accordingly, the petition for certiorari should be granted.

II. WHETHER THE ARRESTING OFFICER HAD PROBABLE CAUSE IS IRRELEVANT TO THE QUESTION.

Respondent urges that this Court deny the petition for writ of certiorari because Officer Lukensmeyer lacked probable cause to arrest respondent. According to respondent, "[t]his secondary issue further complicates the resolution of this case and is an additional reason to deny the State's Petition." Opp. 14. Respondent's argument fails for three reasons.

First, whether the arresting officer had probable cause to arrest is irrelevant to the question presented: whether a police officer may question a passenger of a vehicle lawfully stopped for a traffic violation after the purpose of the stop has been completed, even though the officer does not have reason to believe that criminal activity is afoot.

Second, this issue was never reached by the Illinois Supreme Court.

Third, in any event, probable cause existed to support the arrest. Probable cause for an arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed and that the person arrested has committed the offense. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Although probable cause requires more than mere suspicion, it does not require the arresting officers to have in their hands evidence sufficient to convict. *Brinegar v. United States*, 338 U.S. 160, 174-76 (1949).

It is important to keep true to the notion that "[t]here is no war between the Constitution and common sense." *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). "Probable cause does not emanate from an antiseptic courtroom, a sterile library, or a sacrosanct adytum, nor is it a 'pristine philosophical concept existing in a vacuum,' but rather, it requires a pragmatic analysis of 'every day life on which reasonable and prudent persons, not legal technicians, act.'" *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972) (citations omitted). In fact, probable cause does not even require that the officer's belief be "more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983). As this Court observed:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, *but as understood by those versed in the field of law enforcement*.

Illinois v. Gates, 462 U.S. 213, 232 (1983) (emphasis added). An item may be seized without a warrant under the plain view

doctrine. The plain view doctrine applies where: (1) the police view the object from a place where they are legally entitled to be; and (2) it must be immediately apparent to the police that the items may be evidence of a crime, contraband, or otherwise subject to seizure. *Horton v. California*, 496 U.S. 128, 136-37 (1990).

The present case is a clear example where the plain view doctrine applies. As to the first requirement, the officer viewed the object during a conversation with respondent while standing on the side of the road. This was not a coercive setting. This is plainly obvious through the actions of respondent prior to the arrest. He felt comfortable enough not only to answer the officer's questions about who he was but, more importantly, to engage the officer in further conversation by posing a question to the officer about his brother's arrest. Clearly, the officer viewed the object from a place where he had a right to be. As he testified on direct examination, because he placed the driver under arrest, the vehicle was then the officer's responsibility.

The second requirement of the plain view doctrine is also satisfied. Officer Lukensmeyer, a 35-year veteran police officer with over 2000 narcotics arrests, testified that during the conversation, he twice saw a small clear plastic item containing something white and that he knew that it was contraband, either heroin or cocaine. App. A at 2-3.

When looking to all the factors the officer had before him, the fact that he knew he was looking at contraband, his extensive experience, the fact that the drugs were in plain view, and the clear instruction of analogous case law, the existence of probable cause is obvious.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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